

EXHIBIT B

FILED
CIVIL BUSINESS OFFICE 21
CENTRAL DIVISION

2010 DEC 10 PM 1:06

CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

STEPHEN L. PORTER – SBN 067177
WHITEHEAD & PORTER LLP
220 Montgomery Street, Suite 1850
San Francisco, CA 94104
Telephone: (415) 781-6070
Facsimile: (415) 788-6521

Attorneys for Defendant
Life Technologies Corporation

SUPERIOR COURT OF CALIFORNIA – UNLIMITED JURISDICTION
COUNTY OF SAN DIEGO

BIOSEARCH TECHNOLOGIES, INC.,	)	Case No. 37-2010-00103944-CU-BC-CTL
)	
Plaintiff,	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES IN SUPPORT OF
vs.	)	DEMURRER BY DEFENDANT LIFE
	)	TECHNOLOGIES CORPORATION TO
LIFE TECHNOLOGIES	)	COMPLAINT OF PLAINTIFF
CORPORATION, and DOES 1 through	)	BIOSEARCH TECHNOLOGIES, INC.
25, inclusive,)	
	)	Hearing Date: March 25, 2011
Defendant.	)	Time: 10:30 a.m.
	)	Location: Dept. 66

I. INTRODUCTION

The failure by Plaintiff Biosearch Technologies, Inc. ("BTI") to allege the existence of any contract between it and defendant Life Technologies Corporation ("LTC") giving rise to liability is fatal to BTI's first cause of action for breach of contract. The complaint puts the proverbial cart before the horse, ignoring the fact that a license has to be created by contract before any suit can be brought for it breach. And as all of BTI's other causes of action¹ are

¹ BTI alleges the following causes of action: (1) breach of contract, (2) unfair competition under B&P Code §17200, (3) common law unfair competition, (4) unjust enrichment, (5) unfair advertising and (6) interference with prospective economic advantage.

1 premised upon the alleged breach of a nonexistent contract, they fail as well—like a house of
2 cards without a foundation.

3 **II. STATEMENT OF THE MATERIAL ALLEGATIONS OF THE COMPLAINT**

4 The substantive allegations of the complaint are as follows: BTI owns and sells a
5 quencher dye known as “BHQ” used, *inter alia*, for production of probes for gene expression
6 analysis. Complaint, ¶7-8. BTI sells BHQ solely for research and development purposes and
7 prohibits any commercial, clinical and *in vitro* diagnostic uses (“commercial” use) of BHQs or
8 products incorporating them through a limited use agreement (“EULA”). *Id.*, ¶9. In 2009, the
9 United States Centers for Disease Control selected BHQ probes for worldwide use in testing for
10 the H1N1 virus. *Id.*, ¶10. Sometime in 2009 LTC learned that BHQ had been selected for use
11 in H1N1 probes and arranged with a third-party supplier, Glen Research (“Glen”), to purchase
12 BHQ from the third-party distributor. *Id.*, ¶11. LTC then sold probes labeled with BHQ in an
13 “H1N1 Kit” to clinically diagnose swine flu. *Id.*, ¶¶12-13. Such sales were for commercial use
14 and, therefore, render LTC liable for breach of contract and for additional tort claims (statutory
15 and common law unfair competition, unjust enrichment, unfair advertising and intentional
16 interference with prospective economic advantage). *Id.*, ¶¶14-50.

17 **III. ARGUMENT**

18 **A. No Cause of Action is Alleged for Breach of a Contract Between the Parties**

19 A general demurrer lies for failure to state a cause of action. CCP §430.120(e). The
20 complaint does not allege the existence of any contract between BTI and LTC giving rise to
21 liability. While the complaint alleges that LTC “arranged to purchase” BHQ from a third party,
22 Glen, (*id.*, ¶ 11), the complaint does not allege the terms of any contract between Glen and LTC
23 nor does it allege any breach thereof. Rather, the breach of contract cause of action consists of
24 a deficient allegation of contract terms (LTC arranged to purchase BHQ from Glen) and a
25 conclusion which doesn’t follow (LTC breached a contract with BTI). These allegations don’t
26
27
28

1 state a cause of action for breach of contract between LTC and BTI, whether viewed separately
2 or combined.

3 A contract requires (1) parties capable of contracting, (2) their consent, (3) a lawful
4 object and (4) consideration. Civil Code § 1550. The parties must “all agree on the same thing
5 in the same sense”. Civil Code § 1580. Consent must be mutual and communicated by each
6 party to the other. Civil Code § 1565. Acceptance of an offer must be absolute and
7 unqualified. Civil Code § 1585. Here, the complaint does not allege the essential terms of any
8 contract between LTC and anyone else, most importantly that LTC and Glen agreed to license
9 terms which included the use restrictions set forth in the EULA. The complaint is also silent on
10 other terms which are essential in any commercial contract of this nature —product
11 specifications, price, quantity, warranty, delivery, payment, dates for performance, etc.

12 The complaint skirts these fatal defects. Instead, BTI alleges facts that are not relevant
13 to any contract at issue, such as that BTI included the EULA in its contracts, published it on its
14 website and had included it in shipments made long ago to LTC’s predecessor, Invitrogen, that
15 are unrelated to the alleged breach in 2009.² Complaint, ¶ 9, 3:14-16. Significantly, BTI does
16 not allege that the EULA was a required term in any contract entered by its distributor, Glen,
17 with third parties such as LTC. BTI alleges only that it restricted Glen’s distribution rights.
18 Id., ¶ 11, 4:4-6. Hypothetically, if Glen breached a distribution contract with BTI by selling
19 BHQ to third parties such as LTC without including the EULA as a contract term, BTI may
20 have a cause of action for breach of contract against Glen; however, BTI would not have any
21 such claim against the parties with whom Glen contracted, such as LTC.

22 //

23 //

24
25
26 ² While BTI alleges it included the EULA in sales of BHQ it made to LTC’s predecessor Invitrogen in 2001, BTI
27 does not allege breach of contract stemming from any of those sales. Complaint, ¶ 9.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 The ambiguity here is substantive and potentially fatal to the complaint: If BTI is
 2 alleging that the EULA was a term of a LTC-Glen contract because BTI “historically” included
 3 the EULA in its contracts with its customers, a general demurrer for failure to state a cause of
 4 action will lie. On the other hand, if BTI is suggesting that there was a contract between LTC
 5 and Glen that included the EULA as a term of agreement, that allegation must be made
 6 explicitly in order for LTC to contest it on the merits; further, the separate allegations regarding
 7 BTI’s own contracts and its website would become irrelevant and subject to a motion to strike.
 8 The uncertainty must be eliminated in order for LTC to know the specific allegations against it,
 9 both for a further demurrer (or other plea in abatement) and also to defend the merits of the
 10 breach of contract cause of action.

11 **C. It is Not Clear Whether a Written or Oral Contract is Alleged**

12 Under CCP§430.10(g), a special demurrer lies when it cannot be ascertained from the
 13 complaint whether the alleged contract is oral or written. This is a fundamental defect with
 14 BTI’s complaint, as the pleading hides the infirmities of the alleged contract. As with the
 15 special demurrer for uncertainty, BTI glosses over the critical fact that its complaint is, at best,
 16 based upon a contract to which it is not a party. Instead, BTI alleges terms which it contends
 17 are included in its contracts with customers, specifically the EULA, and then segues to the
 18 charging allegation that LTC arranged to purchase BHQ from Glen. BTI intentionally omits
 19 any allegation as to the form of any contract between LTC and Glen, i.e. whether it is in
 20 writing, oral or implied. A demurrer under Section 430.10(g) is designed to raise potential
 21 defenses, such as the statute of frauds. California Practice Guide, *supra*, at §7:91. Since any
 22 contract between LTC and Glen would be one between merchants governed by the Uniform
 23 Commercial Code, numerous contract defenses could exist depending upon whether the
 24 contract was oral or written, and upon the express terms of the latter. See, for example, Cal.
 25 Comm. Code §2201[written memorandum of contract of sale] and §2207 [written confirmation
 26 of terms and additional terms]. Where written or oral contracts may exist, the failure to specify
 27

1 which type of contract is alleged makes the complaint subject to a special demurrer. *Zumbrun*
 2 *v. University of Southern California* (1972) 499 Cal.App.2 [Since contractual relationship
 3 between student and university has both oral and written elements, university's special
 4 demurrer to action by student, upon ground that it could not be ascertained whether the contract
 5 upon which student based her action was written or oral, was well taken].

6 **D. The Tort Claims Fail in the Absence of a Viable Contract Claim**

7 Each of the tort causes of action is predicated upon the breach of contract cause of
 8 action, namely that LTC was under a contractual obligation not to sell products containing
 9 BHQ for commercial use. For example, the second cause of action for statutory unfair
 10 competition alleges that LTC "decided to breach its license obligations to Biosearch"
 11 (Complaint, ¶ 23, 5:19-20), and that LTC engaged in unfair competition "[b]y wrongfully using
 12 the BHQ® in contravention of the license terms". *Id.*, ¶ 25, 6:6.

13 Similarly, the third cause of action for common law unfair competition is based upon
 14 "using probes labeled with BHQ® in violation of the EULA". *Id.*, ¶ 33, 7:14. The fourth
 15 cause of action contains no substantive allegations, instead merely incorporating prior
 16 allegations. *Id.*, ¶ 37, 8:8-9. The fifth cause of action alleges that LTC did not have the right to
 17 sell products incorporating BHQ because it was prohibited by the EULA, which allegations are
 18 based upon the prior averments regarding license restrictions. *Id.*, ¶¶ 39-42, 8:15-26. Finally,
 19 the sixth cause of action for intentional interference with prospective economic advantage
 20 incorporates the prior allegations regarding license restrictions and re-alleges that LTC's
 21 actions were in violation of licenses. *Id.*, ¶¶ 45, 47-48, 9:5-6 and 15-24.

22 All of the tort causes of action depend upon the existence of a contract between the
 23 parties, one in which LTC agreed to the license terms alleged by BTI, specifically the EULA.
 24 Absent an alleged contract between the parties containing such license terms, the tort claims
 25 fail.

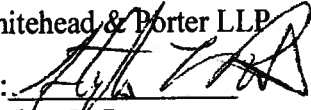
26 //
 27

1 **IV. CONCLUSION**

2 The complaint does not allege a cause of action between plaintiff and defendant. It does
3 not allege any contract terms between defendant and a third party, Glen. Rather, it only asserts
4 that LTC purchased BHQ from Glen. No cause of action is stated under these allegations,
5 under any theory.

6 It is respectfully requested that the demurrers be sustained without leave to amend.

7 Dated: December 9, 2010

Whitehead & Porter LLP
By: 
Stephen L. Porter
Attorneys for Defendant
Life Technologies Corporation

WHITEHEAD & PORTER LLP
220 Montgomery Street, Suite 1850
San Francisco, CA 94104